Filed 7/2/19 P. v. Colin CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JUAN LUIS COLIN, Defendant and Appellant.	B286588 (Los Angeles County Super. Ct. No. GA087746)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Reversed in part, affirmed in part, and remanded with directions.

Jena Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

PROCEDURAL BACKGROUND AND ISSUES ON APPEAL

The People charged appellant Juan Luis Colin with the murder of John Pollerana (Pen. Code,[1] § 187, subd. (a); count 1), and attempted murder of David Santa Anna and Phillip Santa Anna (§§ 187, subd. (a), 664; counts 2 & 3). As to each count, the People alleged that a principal personally used a firearm (§ 12022.53, subds. (b) & (e)), personally and intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)), and personally and intentionally discharged a firearm causing death to Pollerana (§ 12022.53, subds. (d) & (e)(1)). The People further alleged that appellant committed his offenses for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). Finally, the People alleged that appellant suffered a prior conviction that resulted in a state prison sentence (§ 667.5, subd. (b)), was a prior serious felony (§ 667, subd. (a)(1)), and was a prior strike. (§ 667, subds. (b)–(j), 1170.12.)

A jury convicted appellant of one count of second degree murder (§ 187, subd. (a)) and two counts of attempted murder (§§ 187, subd. (a), 664). The jury found true that appellant committed his offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C) & (b)(4)) and that a principal personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)). The trial court sentenced appellant to state prison for 105 years to life, plus 33 years and eight months.

---

[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

Appellant contends on appeal that (1) the trial court erred by failing to instruct sua sponte the jury on imperfect self-defense, (2) the trial court failed to adequately inquire into potential juror bias, and (3) the prosecutor committed prejudicial misconduct by misstating the reasonable-doubt standard during closing argument. Appellant also challenges certain sentence enhancements, fees, and assessments imposed by the court. Apart from issues involving sentence enhancements, we find no error. Accordingly, we remand for resentencing, and otherwise affirm.

FACTUAL BACKGROUND

One evening in June 2016, appellant Juan Luis Colin, a member of the Choppers 12 street gang, was visiting with friends at the Del Mar Motel in Rosemead. Appellant was in a room on the motel's ground floor with three street-gang members, two of whom belonged to the Lott Stoners gang while the third belonged to the Pico Nuevo gang.

Two of appellant's eventual three victims, Phillip Santa Anna and John Pollerana, were in a room on the motel's second floor. Both belonged to the Lomas street gang. Their gang claimed the territory in which the motel sat. A gang protects its territory and considers its territory "sacred." If a gang member travels outside of his territory into another gang's territory, that can be considered disrespectful with conflict likely to follow.

Shortly before midnight, Phillip's brother, David Santa Anna, also a member of the Lomas gang, arrived at the motel with his girlfriend, Alondra Gomez. As David and Gomez passed appellant's room on the first floor, David thought a man standing

outside the room looked familiar. David walked over to the man and said "what's up." As David and the man spoke, several men stepped out of the room. David told the group of four men that they were in Lomas territory. David heard one man reply "Choppers," the gang to which appellant belonged. A second man said the gang name "Lott." Gomez, who was standing too far away to hear what any of the men were saying, thought both sides looked angry. Gomez saw one of appellant's acquaintances, whom she recognized as "Scrappy" from "The Lott," holding a gun behind his back. She did not see anyone else holding a weapon.

The conversation ended without incident and David returned to where Gomez was waiting for him. They walked upstairs to the second-floor room occupied by Phillip and Pollerana. David told Phillip and Pollerana that the men downstairs were "tripping" or acting "crazy," to which Phillip and Pollerana responded "let's go—all right, let's go." The three of them left the room and headed toward the stairs. According to David, their intention was "at the most" to have a fist-fight with appellant's group. The motel manager, who was working outside, saw the three men head toward the stairs; he testified they ran on the second floor walkway toward the stairs, but we have reviewed a DVD video-recording from the motel's security camera which shows they were not running. Sensing "something was wrong," the manager ran inside and hid behind a concrete wall.

After descending the stairs, David, Phillip, and Pollerana walked past appellant's room and whistled "to get their attention." The room's door swung open and someone whom David could not identify opened fire. Pollerana was directly outside the room when the shooting began. David and Phillip fled, but two bullets struck Pollerana, fatally injuring him.

A sheriff's deputy arrested appellant shortly after the shooting. When taken into custody, appellant's left hand was bleeding; appellant told the deputy that he had been shot in the hand, but neither the deputy nor the paramedic who treated appellant on the scene saw a bullet wound. A deputy took appellant to a hospital for treatment of his injury. At the hospital, the deputy performed a gunshot residue test on appellant's hands. The test recovered particles consistent with gunshot residue, meaning appellant had either handled or fired a firearm or been within its vicinity when it was fired.

The morning following the shooting, sheriff's investigators interviewed appellant. The interview was recorded and played for the jury. Appellant told the investigators that he and a friend went to see a woman who was staying at the motel. When they arrived, a gang-related verbal altercation about claims to the "hood" was underway. Appellant said he "jumped off" and ran away from the motel before the shooting started. An investigator asked if appellant was inside the room during the shooting. Appellant said he was outside when the shooting began and repeatedly denied being the shooter, adding that he thought the gunfire may have come from the motel's parking lot.

The morning after the shooting, a firearms expert examined the motel room occupied by appellant and his companions. The expert found seven .9 millimeter caliber expended casings in the room. He also located seven bullet strikes in the room's door, two in a parking stall outside the door, and three in a vehicle in the parking lot. The expert also found bullets and bullet fragments in the motel room and parking lot. Most of the bullets were consistent with the .9 millimeter casings found inside the room. One bullet from the parking lot near the

motel room was consistent, however, with a .38 special or .357 magnum revolver. The expert opined that the bullets and bullet fragments were consistent with two guns being fired during the shooting. Based on the bullet trajectory analysis and damage to the door, the expert concluded all the bullets were fired from inside the motel room toward the outside, and none were fired from outside into the room.

Appellant rested without presenting evidence in his defense.

DISCUSSION

I. Imperfect Self-Defense Instruction Not Required

Appellant contends the trial court erred in not instructing on imperfect self-defense as a lesser included offense. The trial court had a sua sponte duty to instruct the jury on general principles of law that equipped the jury to understand the issues that the evidence raised. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) That duty extends to instructions on lesser included offenses. Such instructions ensure that the jury will consider the full range of possible verdicts and reach an accurate verdict, not limited by the parties' strategies, mistakes, or ignorance. (*Id*. at p. 161; *People v. Birks* (1998) 19 Cal.4th 108, 112; *People v. Wickersham* (1982) 32 Cal.3d 307, 323–324, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.) " 'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' " (*People v. Flannel* (1979) 25 Cal.3d 668, 685 (*Flannel*), quoting *People v. Wilson* (1967) 66 Cal.2d 749, 763.) We review de novo the trial court's failure to instruct on an uncharged lesser

included offense.[2] (*People v. Waidla* (2000) 22 Cal.4th 690, 739; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) We find the trial court did not err.

Imperfect self-defense is a type of voluntary manslaughter and therefore is not a true defense, but instead a lesser included offense of murder. (*People v. Barton*, *supra*, 12 Cal.4th at pp. 200–201.) Imperfect self-defense occurs when a defendant acts in the actual, but *unreasonable*, belief that he or she is in imminent danger of great bodily injury or death, requiring deadly force in self-defense. (*People v. Simon* (2016) 1 Cal.5th 98, 132; see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1116 [attempted imperfect self-defense is attempted voluntary manslaughter].)

During initial discussions on jury instructions, the trial court concluded the evidence did not support instructing the jury on imperfect self-defense. The court noted the scientific evidence demonstrated all gunshots came from inside the motel room, and no substantial evidence existed of any shots being fired into the room. The trial court asked defense counsel, "Are there any particular instructions that you're going to be requesting . . . ?" Counsel responded: "Not that I can think of, no."

When the parties reconvened to finish the jury instructions, the court noted that David had exchanged words with the men

---

[2] The trial court's analysis of jury instructions relied in part on *People v. Sinclair* (1998) 64 Cal.App.4th 1012, which appellant claims the court misapplied. We need not address the courts' reliance on *Sinclair*, however, because we review the trial court's judgment, not its reasoning. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1119, fn. 4; *People v. Boulter* (2011) 199 Cal.App.4th 761, 767.)

outside appellant's motel room, after which the men returned to their room and closed the door—an event which broke the causal link between the exchange of words outside the motel room and the later shooting. Shortly thereafter, David, Phillip, and Pollerana descended the stairs[3] and passed by appellant's room, at which time, in the court's view, appellant and his fellow gang members reacted in the heat of the moment to the victims' conduct. Thus, the court concluded, sufficient evidence supported instructing with second degree murder. At the same time, the court further noted, no one inside appellant's motel room testified appellant or anyone else in their room was afraid that David, Phillip, and Pollerana were about to attack, which would have supported an imperfect self-defense instruction.

When the court informed counsel of the court's intended jury instructions, the prosecutor replied, "I guess I'll bring this up now because the court just kind of made reference to it. I guess my concern is if the court is not going to instruct on voluntary manslaughter, I don't know how this case is going to turn out. I don't think anyone does. But I want to make sure that we're on solid, legal footing in terms of the instructions that are given relative to—and I guess I agree with the court in terms of no lawful self-defense instruction being given. But in terms of . . . possibly an imperfect self-defense or something like that, I guess

---

[3] The record does not support appellant's characterization of David, Phillip, and Pollerana as "thundering down the stairs." We have reviewed a DVD-recording from the motel security camera that shows David, Phillip, and Pollerana walked down the second-floor balcony, descended the stairs, and were walking past the closed door of appellant's motel room when the shooting started.

that that's the only concern I had." The court responded: "Well, I understand your concern. [¶] When I sat at [counsel] table, I shared that concern to be careful and to make sure that—[¶] I understand. Look, I have an obligation, whether it's asked or not . . . to instruct on all applicable theories that apply to this case. . . . [¶] I do not see anything that would justify the giving of any type of voluntary manslaughter instruction, whether sudden quarrel, heat of passion, or the *Flannel* imperfect self-defense." We do not understand the prosecutor's expression of "concern" as the prosecutor suggesting he disagreed with the trial court's assessment that no substantial evidence existed to support imperfect self-defense.

We find the court correctly instructed the jury because the record contains no substantial evidence upon which a reasonable jury could have found beyond a reasonable doubt that appellant and his fellow gang members shot at their victims actually believing they needed to protect themselves from serious bodily injury or death. The evidence shows that David, Philip, and Pollerana walked to appellant's motel room intending to confront, and possibly fight, appellant and his acquaintances. When police asked David what their intentions were, he responded, "[j]ust, just to, like, partly, like, I mean we're on camera, so our intentions ain't to go fucking shoot. Like, our intention is to go, like, maybe at the most a fist-fight, you know?" The record contains no evidence that David, Philip, or Pollerana had weapons or otherwise tried to make good on their desire to fight appellant and his companions. After descending the motel stairs, David, Philip, and Pollerana passed the door of appellant's motel room and whistled. The surveillance video shows they neither knocked on the door nor tried to enter appellant's room. No one

testified David, Philip, or Pollerana challenged appellant or his companions to fight. Nevertheless, someone inside appellant's room flung open the door and gunfire erupted from the room, killing Pollerana.

In addition to how events unfolded in the moments immediately before the shooting, appellant denied being involved in the shooting itself because he claimed he was running away from the motel room when he heard gunfire. Appellant did not present a defense, and his companions did not testify. As the court noted in discussing jury instructions, "All we have are individuals [David, Phillip, and Pollerana] coming downstairs. That's it. There's no evidence that those individuals were armed. There is no evidence from anybody in [appellant's] room that anybody thought [David, Phillip, and Pollerana] were armed."

We disagree with appellant's assertion that the jury could have reasonably inferred shots were fired into the motel room. The forensic evidence indicated all shots were fired from within the room. As the forensic expert testified: "Q: Were you able to make a determination as to whether the shots were fired from inside the motel room out or vice-versa? A. The shots were fired from inside the hotel room outward. There's no indication of anything being fired from outside in." Appellant offered no forensic evidence that shots were fired from outside.[4] Absent

---

[4] The forensic expert explained the bullet strikes on the outside face of the door were consistent with gunfire emerging only from inside the room because the motel door opened inward and "continuation damage" in the wall behind the open door showed the bullet passed through the front of the open door into the interior wall. The forensic expert testified: "[T]he damage that I observed on the door and behind the door are all consistent with shots being fired from inside the room in an outward

evidence to support appellant's assertion, the inference he urges is speculation insufficient for the jury to decide the issue in appellant's favor. (*People v. Sakarias* (2000) 22 Cal.4th 596, 620 [speculation is insufficient to instruct on a lesser included offense].)

We also conclude no reasonable jury could have found beyond a reasonable doubt that the gang members in appellant's motel room fired their gun(s) because they feared an imminent attack. Appellant and his companions were in the safety of their motel room behind a closed door that David, Phillip, and Pollerana did not try to open or breach. As the court noted, "There's been no testimony of 'I was in fear.' 'I felt I was in fear for my life.' 'I felt I was going to get shot.' Not even in [appellant's] statement.[5] He just said he heard shots and he ran. He didn't even know who was shooting, didn't know if the shots—where they were coming from. I mean, he claimed he didn't know anything. He just heard shots and ran. So there's nothing—nobody said 'I felt that I was in danger.' There's

---

direction . . . ." He then elaborated that "some" shots "remained within the room." More specifically, "a lot of shots were fired from the inside into the door before it—while it was being opened, and some shots got outside."

5 The court was referring to appellant's statement to police investigators in the hospital. In a passing remark, appellant told investigators that during the verbal altercation which he claimed was already underway when he arrived at the hotel—which appellant said was not a "fight" but was instead "people just talking shit"—"they" (appellant did not identify who "they" were) "threatened me and one of my friends." Appellant neither described the threat nor claimed that he or his companions shot at their victims because of that undefined threat.

nothing to even suggest that that was the case. And, in fact, all the shots are coming from inside the room and going out. There's nothing from the outside going in. . . . [I]f there had been some testimony from somebody inside that room talking about their fear or their concerns or, you know, 'we heard these guys coming downstairs and I thought there was going to be a shooting. We thought we had to defend ourselves.' Well, under those circumstances, certainly it's possible that that [imperfect self-defense] instruction would be required. But the way the evidence played out in this case, I don't see it at all. So I don't think it's appropriate to give any of those lessers, any voluntary manslaughter at all." Based on this record, the jury would have been forced to speculate that appellant or his companions opened fire out of fear and the belief that they needed to protect themselves. Speculation cannot substitute for substantial evidence. (Cf. *People v. Barton*, *supra*, 12 Cal.4th at p. 201, fn. 8 ["Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive"].)

II. No Error Not Holding Hearing About Jury Fears of Gang Retaliation

During the first day of trial, an unidentified juror delivered a note to the court which stated: "Fearing a sense of fear for my life due to [appellant] having possible communications with his gang for retaliation purposes." Without informing the jury, or initially counsel, of the note, the court told jurors not to worry about gang violence. The court told the jury:

"I did want to just address one issue for all my jurors, which is that sometimes in cases . . . that involve charges which

allege violence or . . . have some type of gang—alleged gang flavor to them, sometimes I have jurors who express some concerns. They feel maybe a little uneasy or a little concerned because of the general nature of the case.

"If for whatever reason that's you, let me just indicate some words of reassurance for you. I've been doing this for a long time. I've been working the criminal justice system for 23 years. . . . And I can say a couple of things.

"Number one, I've never, ever in my career seen or heard of an incident in Los Angeles Superior Court which tries thousands and thousands and thousands of cases every year of any juror ever having any kind of problem, ever being hassled by anybody, ever being threatened by anybody. . . .

"Secondly, I would indicate to all of you that your personal information is completely confidential. Nobody has your addresses, your names, or your home information or your phone numbers or where you work."

The court then excused the jury for lunch. In the jury's absence, the court informed counsel about the note from the unidentified juror and read the note to counsel. The court told counsel that it "didn't want to single that one juror out [who wrote the note]. That's why I made the general comments that I made to just reassure that person. And if anybody else had concerns, potentially, to reassure them. I wanted to keep it as neutral as possible." Neither party sought a hearing to question the unidentified juror, nor did defense counsel object to the court's statement to the jury. The prosecutor stated that his "only concern is if the court was not successful in reassuring this person, I'm not sure—I didn't hear everything that the court said. But I guess I would want it communicated to the jury that if,

despite whatever reassurances they've been given, they don't feel that they can be fair or impartial and this is somehow going to cause them to not be able to deliberate in the manner in which they need to, that they bring that to the court's attention."

The court replied that it understood the prosecutor's concern. The court stated it would invite jurors to raise with the court any additional concerns that jurors might have. The prosecutor replied, "Okay." Upon the jury's return from lunch, the court told the jurors: "[J]ust to also indicate to the jurors on the topic that I talked about to you right before lunch. If anybody has any lingering concerns or anything, feel free to bring it to my attention and I can address it for you, if need be." There is no record of any juror accepting the court's invitation.

Appellant contends the court should have held a hearing sua sponte under section 1089 to inquire whether the juror who wrote the note could perform his or her duties. Section 1089 provides in part that a court may discharge a juror upon a showing of good cause that the juror cannot perform his or her duty. " ' "[O]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." ' [Citations.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 941–942; *People v. Cleveland* (2001) 25 Cal.4th 466, 478.) We review the court's decision whether to hold a hearing for abuse of discretion. (*Cleveland*, *supra*, at p. 478.) The court did not err in not holding a hearing.

First, it bears noting that neither side requested a hearing, indicating neither side worried about the jurors' reactions to the gang evidence. Second, a juror's potential fear of a defendant, by itself, does not establish bias or other grounds for discharge.

(*People v. Manibusan* (2013) 58 Cal.4th 40, 56.) In *People v. Navarette* (2003) 30 Cal.4th 458, a juror expressed fear of the defendant. (*Id.* at pp. 499–500.) Reassuring jurors that their personally identifying information was private, the trial court asked jurors to come forward if they felt unable to be fair and unbiased. (*Id.* at p. 500.) No juror came forward, and the Court of Appeal held no hearing was needed. (*Ibid.*) The circumstances here are similar because, like the *Navarette* trial court, the trial court here addressed the juror's concerns without unnecessarily implicating the defendant or calling the jury's attention to the specifics of the juror's fears, which might have spread or amplified those fears. (*Ibid.*) And like *Navarette*, no juror here told the trial court of any lingering fear of gang retaliation after the trial court put the risk of gang retaliation in perspective and assured the jurors that their personal information would remain confidential.

Appellant contends the court should have asked the remaining jurors for their reaction to the court's comments and their views, if any, about gang retaliation. We disagree. Holding a hearing might have suggested that the court itself feared the jurors might be at risk of gang retaliation. (See *People v. Manibusan*, *supra*, 58 Cal.4th at p. 53 ["to ensure the sanctity and secrecy of the deliberative process, a trial court's inquiry . . . should be as limited as possible"].) Instead, the trial court's measured remarks and reassuring comments in lieu of a hearing likely put the risk in proper perspective for the jurors, and thus likely reduced any prejudicial risk to appellant. (*People v. Navarette*, *supra*, 30 Cal.4th at p. 500.)

III. No Prosecutorial Misconduct

Before closing argument, the trial court told the jury that the People carried the burden of proving guilt beyond a reasonable doubt. Appellant contends the prosecutor nevertheless twice misstated the reasonable doubt standard of proof during closing argument. Appellant notes that the first purported misstatement—"You must have reasonable doubt in order to find a defendant not guilty"—turned the burden of proof on its head. Appellant asserts the second purported misstatement—"If . . . you still have a reasonable doubt as to the truth of the charge, you must find the defendant guilty (*sic*)"—further confused the jury.

Appellant forfeited his claim of prosecutorial misconduct because he did not preserve the claim by objecting at trial. " 'A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966; see *People v. Centeno* (2014) 60 Cal.4th 659, 663.) A prosecutor's "misstatements of law are generally curable by an admonition from the court." (*Centeno*, *supra*, at p. 674.) "The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct." (*Ibid*.) However, if a defendant "fails to show how objecting would have been futile under the circumstances" or would not have cured the harm, the claim will be forfeited. (*People v. Williams* (2013) 56 Cal.4th 630, 672.) Appellant concedes he did not object to the prosecutor's closing argument. Moreover, he fails to demonstrate how an objection

would have been futile or that it would not have cured the harm. Accordingly, appellant has forfeited any misconduct claim.

But even if not forfeited, we note as an alternative independent basis for our decision that a prosecutor's objectionable statements to the jury do not necessarily constitute misconduct. (*People v. Jasso* (2012) 211 Cal.App.4th 1354, 1362; see *People v. Cortez* (2016) 63 Cal.4th 101, 133.) To establish prosecutorial misconduct based on misstatements of law, a defendant "must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained of comments in an improper or erroneous manner.' " (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667; accord, *People v. Potts* (2019) 6 Cal.5th 1012; *Cortez*, *supra*, at p. 133 [circumstances cleansed the jury of misunderstanding or applying "brief, isolated" misstatement of law].) Here the prosecutor argued as follows:

"This case . . . is going to require you . . . to take all of the evidence that was presented, evaluate it, [and] consider it in conjunction with the law that you will be given after the arguments. . . . Going back to last week when we went through jury selection . . . we talked a lot about . . . core concepts for our criminal justice system. And one of those was that a defendant is presumed to be innocent until such time as the People prove a case to you beyond a reasonable doubt. . . . So I want to talk a little bit about reasonable doubt. . . . [I] want to tell you and I want to plead with you to please hold me to this standard. . . . Proof beyond a reasonable doubt, it's reasonable, as it says. You must have reasonable doubt in order to find a defendant not guilty."

Counsel continued: "If, after you've [considered all of the evidence], you still have a reasonable doubt as to the truth of the charge, you must find the defendant guilty (*sic*).[6] But if after evaluating all of that evidence, you believe that the case has been proved beyond all reasonable doubt, then you must find the defendant guilty. And what does that mean, 'reasonable doubt'? It means not having an abiding conviction of the truth of the charge."

Following closing argument, the court issued its final jury instructions verbally and in written form. The court repeated its instruction on the presumption of innocence, telling the jury: "A defendant in a criminal action is presumed to be innocent until the contrary is proved. . . . This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CALJIC No. 2.90.) The court told the jury that "[r]easonable doubt" was defined as "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (*Ibid.*) Moreover, the court instructed the jury to follow the court's instructions over any contrary statements of law by counsel: "You must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (CALJIC No. 1.00.)

---

6 The court reporter inserted the "(*sic*)" notation in the transcript.

On this record, we find no reasonable likelihood that the jury erroneously embraced the prosecutor's misstatements about the burden of proof. Both immediately before and after the prosecutor's misstatements, the prosecutor correctly stated the law and implored the jury to hold him to the correct burden of proof. Moreover, throughout jury selection and trial, the court instructed the jury that criminal defendants are presumed innocent, that the People bear the burden of proof beyond a reasonable doubt, and that the jury must follow the court's instructions instead of contrary statements about the law by counsel. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 676 [jury presumed to follow court's instruction that court's instructions on legal points supersedes counsel's argument].)

IV. Remand for Resentencing Sentence Enhancements

Appellant suffered one conviction for murder and two convictions for attempted murder. For each count, the jury found true that a principal had personally discharged a firearm causing great bodily injury or death. (§ 12022.53, subds. (c)–(e).) In a bifurcated bench trial, appellant admitted he had suffered a prior conviction for robbery, a serious felony.

A. *Prior Conviction Enhancement*

Based on appellant's prior robbery conviction, the court imposed under section 667, subdivision (a)(1), a five-year sentence enhancement on each count, resulting in three five-year enhancements. (§ 667, subd. (a)(1).) In the initial round of appellate briefing, appellant requested that we remand this matter to the trial court with directions that the trial court strike one of the two prior conviction enhancements imposed on either

count 2 or count 3 for attempted murder for which he received determinate sentences. Appellant observed that only one prior conviction enhancement can be added to the determinate portion of his overall sentence. (*People v. Sasser* (2015) 61 Cal.4th 1, 6–7; *People v. Williams* (2004) 34 Cal.4th 397, 400.) The People agreed with appellant's request, stating the"[c]ourt should order that the trial court strike the five-year serious felony enhancement to either count 2 or count 3."

After the initial briefing had concluded, appellant filed a supplemental opening brief in November 2018. His supplemental opening brief cited then-recently enacted Senate Bill No. 1393 (2017–2018 Reg. Sess.) signed by the Governor on September 30, 2018, and set to take effect on January 1, 2019. The new legislation gave trial courts discretion to strike, in the interests of justice, five-year enhancements imposed under section 667, subdivision (a)(1). In response to appellant's supplemental opening brief, the People filed a supplemental brief in November 2018, in which the People argued application of Senate Bill No. 1393 to this case was not at the time ripe because the legislation did not take effect until January 1, 2019. The People's supplemental brief conceded, however, that the trial court would have discretion under Senate Bill No. 1393 beginning January 1, 2019, to strike five-year prior conviction sentence enhancements for sentences that, as here, are not final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

The net effect of the foregoing expansion of the trial court's statutory authority is the trial court must upon remand (1) strike at least one of the five-year prior conviction sentence enhancements (*People v. Williams*, *supra*, 34 Cal.4th at p. 400),

and (2) may in its discretion strike one or both of the two remaining five-year enhancements (Senate Bill No. 1393).

B. *Gun Enhancement*

In addition to imposing three five-year enhancements for appellant's prior robbery conviction, the court also imposed a 25-year firearm use enhancement on each count, resulting in three 25-year firearm enhancements. (§ 12022.53, subds. (d) & (e)(1).) At sentencing in October 2017, the court lacked discretion to strike the firearm enhancements. While this appeal was pending, the Governor signed Senate Bill No. 620 (2017–2018 Reg. Sess.), which amends former section 12022.53, subdivision (h), to permit the trial court to strike a firearm enhancement as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 1.) Because appellant's sentence was not final when Senate Bill No. 620 took effect, appellant contends remand is proper to give the trial court the opportunity to exercise its newly created discretion to strike one or more firearm enhancements. (*People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679.) The People agree remand to permit the trial court to exercise its discretion is proper.

C. *Summary*

In sum, we remand to the trial court and order it to strike at least one of appellant's five-year prior conviction enhancements on his two counts of attempted murder. In

addition, the trial court must consider whether to exercise its newly-created discretion to strike one or both of the two remaining five-year prior conviction enhancements and one or more 25-year firearm enhancements.

V. Fines, Fees, and Assessments

In a supplemental brief, appellant challenges section 1465.8 assessments in the amount of $120, Government Code section 70373 assessments in the amount of $90, a restitution fine of $10,000, and a stayed parole revocation fine of $10,000. Appellant argues that the trial court erred in imposing these fines without determining that he had the ability to pay them. Appellant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Appellant also argues that the fines and fees violate the Eighth Amendment's prohibition on excessive fines.

In *Dueñas*, the trial court imposed on the defendant certain assessments and a $150 restitution fine—the minimum amount required under section 1202.4, subdivision (b)(1). The court rejected the defendant's argument that imposing the assessments and the fine without considering her ability to pay them violated her constitutional rights to due process and equal protection. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.) The Court of Appeal reversed, holding that "the assessment provisions of Government Code section 70373 and . . . section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair[, and] imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1168.)

Imposing a minimum restitution fine without considering the defendant's ability to pay also violated due process. (*Id*. at pp. 1169–1172.) The court reversed the order imposing the assessments and directed the trial court to stay the execution of the restitution fine "unless and until the People prove that [the defendant] has the present ability to pay it." (*Id*. at pp. 1172–1173.)

Appellant recognizes that he did not object to the assessments or fines in the trial court on the same grounds he raises on appeal. The general rule that a defendant forfeited any challenge to the assessments and fine by failing to object or raise the issue below is well-settled. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*).) Appellant argues, however, that the forfeiture rule should not apply because his sentencing occurred before *Dueñas*, and any objection would therefore have been futile.

Courts have addressed similar arguments with different results. In *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), Division Seven of this court held that the forfeiture rule did not apply to a defendant sentenced before *Dueñas* because no court had previously "held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay." (*Castellano*, *supra*, at p. 489.) In *People v. Frandsen* (2019) 33 Cal.App.5th 1126 (*Frandsen*), Division Eight of this court applied the forfeiture rule and disagreed with the defendant's assertion that *Dueñas* constituted " 'a dramatic and unforeseen change in the law.' " (*Frandsen*, *supra*, at p. 1154; accord, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.)

More recently, the Fourth District, Division One, addressed the forfeiture argument in *People v. Gutierrez* (2019) 35 Cal.App.5th 1027 (*Gutierrez*). In that case, the trial court imposed a restitution fine in the amount of $10,000 and certain fees and assessments totaling $1,300. The court held that the defendant, who had been sentenced before *Dueñas*, had forfeited his right to raise an inability-to-pay argument on appeal by failing to raise the argument below. (*Gutierrez*, *supra*, at p. 1029.)

The majority in *Gutierrez* declined to express its views on the correctness of *Dueñas* (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1032, fn. 11), and avoided the "perceived disagreement" between *Castellano* and *Frandsen* about the foreseeability of *Dueñas*, by finding forfeiture on another ground. (*Gutierrez*, *supra*, at p. 1032.) The court explained that the trial court had imposed a restitution fine greater than the statutory minimum; indeed, it had imposed the maximum amount permitted by statute. (*Id.* at p. 1033.) Because "even before *Dueñas*" section 1202.4 permitted the court to consider a defendant's ability to pay when it imposed a fine above the statutory minimum, "a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay." (*Gutierrez*, *supra*, at p. 1033; see also *Frandsen*, *supra*, 33 Cal.App.5th at p. 1154 [prior to *Duenas*, an objection to a fine above the statutory minimum would not have been futile]; *Avila*, *supra*, 46 Cal.4th at p. 729 [the defendant forfeited challenge to restitution fine greater than the minimum by failing to raise the argument below].) "Thus," the *Gutierrez* court explained, "even if *Dueñas* was unforeseeable . . . , under the facts of this case [the defendant] forfeited any ability-to-pay argument regarding

the restitution fine by failing to object." (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033.) Regarding the lesser sum imposed for other fees and assessments, the court stated that the defendant's challenge to these amounts was also forfeited because, as "a practical matter, if [the defendant] chose not to object to a $10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional $1,300 in fees." (*Ibid.*)

The *Gutierrez* court's forfeiture rationale applies here. Because the court imposed a $10,000 restitution fine—an amount far greater than the $300 statutory minimum—the defendant had the right, even before *Dueñas*, to request that the court consider his inability to pay that amount and "had every incentive" to do so. (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033.) Because he failed to raise his inability to pay the $10,000 fine, appellant, like the defendant in *Gutierrez*, "surely would not complain on similar grounds" as to the other imposed assessments totaling $210 or a stayed parole revocation fine. (*Ibid.*; see also *Frandsen*, *supra*, 33 Cal.App.5th at p. 1154 [because the defendant failed to object to $10,000 restitution fine based on inability to pay, he failed on appeal to show "a basis to vacate assessments totaling $120 for inability to pay"].) We therefore conclude that appellant has forfeited his arguments challenging these assessments and restitution fine.

Finally, appellant incorrectly argues that the imposition of the fines, fees, and assessments without an ability-to-pay determination constitutes an unauthorized sentence. An unauthorized sentence may be corrected on appeal because it presents pure questions of law independent of factual issues. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) A defendant's

ability to pay a fee or fine does not present a question of law. (*People v. McCullough* (2013) 56 Cal.4th 589, 597.) Factors bearing on the determination include the "defendant's current age and health, education, prospects of future earnings, assets, and any other sources of income, as well as other fines and fees ordered." (*Id.* at p. 597.) By failing to raise the issue in the trial court, the defendant forfeits it on appeal. (*Ibid.*) The resulting sentence is not unauthorized. (*Id.* at pp. 595–598.)

DISPOSITION

The convictions are affirmed. Upon remand, the trial court shall strike at least one prior-conviction enhancement imposed under section 667, subdivision (a)(1), in connection with appellant's convictions for attempted murder (counts 2 and 3). In addition, the court may, in its discretion, strike one or both of the remaining two section 667, subdivision (a)(1), enhancements in connection with appellant's conviction for murder (count 1) and his conviction for attempted murder (either count 2 or 3) for which the court did not already strike the prior-conviction enhancement. The court shall also determine whether to strike any or all firearm enhancements imposed under section 12022.53, subdivisions (d) and (e)(1).

Upon completion of the foregoing directions following remand, the court shall reduce appellant's sentence consistent with this remand order, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

LEIS, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.